Petition

81-2175

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN THOMAS BIGLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does outrageous government conduct provide a defense against prosecution?

2. What procedures should be used to evaluate a claim of outrageous government conduct?

3. What constitutes agreement as to the essential nature of a conspiracy?

4. Does the instruction that you can only convict one conspirator by also convicting the other conspirator violate Due Process where the evidence against one is overwhelming and inflammatory and the evidence against the other is tenuous and circumstantial?

5. Did the Trial Court deprive the appellants of their constitutional rights by denying them the right to submit certain tape recordings to expert testing and analysis?

Petitioner Bigley adopts and incorporates by reference herein the Brief on questions 1, 2, and 3 above in the Petition for Writ of Certiorari filed in this Court by codefendant Dean No. 81-2017. Codefendant Dean has also adopted in his Petition the argument briefed in this Petition by Bigley on question 5 above.

PARTIES

In addition to the parties listed in the caption of this Petition, Roscoe Emory Dean Jr. was a codefendant and coappellant in the proceedings below. Mr. Dean has also filed a petition for certiorari which incorporates Question Number 5 above and which briefs questions 1, 2, and 3 above. Bigley adopts those arguments in Dean's Brief No. 81-2017.

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United States vs. Finkelstein, 526 F. 2d 517 (2nd. Cir. 1975)

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United States vs. McMillan, 508 F. 2d 101, 104 (8th. Cir. 1974) cert. den. 421 U.S. 916 (1975)

White vs. Maggio, 556 F. 2d 1352 (5th Cir. 1977)

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JOHN THOMAS BIGLEY,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John Thomas Bigley, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the case.[1]

OPINIONS BELOW

The findings of fact and conclusions of law by the district court concerning government misconduct were not reported. *See* Appendix to Petition (hereinafter "Pet. App.") at 5a, 13a. The opinion of court of appeals was reported at 666 F.2d 174. *See* Pet. App. at 17a.

[1]The appellate decision was rendered by Unit B. of the old Fifth Circuit, which has now become the Eleventh Circuit. The mandate issued from the Eleventh Circuit. *See* Pet. App. at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 22, 1982. *See* Pet. App. at 1a. A timely Petition for Rehearing was denied on March 23, 1982. *See* Pet. App. at 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process clause of amendment XIV of the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

John Thomas Bigley ("Bigley") incorporates by reference the "statement of the case" included in the petition for certiorari filed by the co-defendant, Roscoe Emory Dean, Jr. ("Dean") 81-2017 with the following additions and corrections.

Three important factors with respect to Bigley should be kept in mind.

First, in the more than thirty tape recordings obtained as evidence, there is not one single instance in which criminal conduct or acts by Dean is discussed in Bigley's presence while being taped.

Second, Dean time and time again on the tapes repeatedly stated to the undercover agent that Bigley was not involved and did not know what was going on.

Third, on the occasions when the undercover agent was in Bigley's presence, the undercover agent studiously avoided

discussing the alleged criminal conspiracy.

The Court of Appeals stated in its opinion that "the only serious question of appellants' guilt" is whether Bigley knew of the narcotics-related objective of the conspiracy.

The Court of Appeals identified ten factual findings which (taken in the light most favorable to the Government) indicate Bigley's knowledge and complicity. These ten findings are included in the appendix.

Of the ten items, the first is Dean's statement to the agent taken out of context that Bigley was "in the thing with us" which is contrasted with Dean's clear and unequivocal statements at least twenty times on the tapes that Bigley was not involved and did not know what was going on.

The second and third items are Dean's use of Bigley's home for a meeting with the undercover agent and Dean's statement to Bigley over the phone during that meeting that he should tell anyone who asked that he (Dean) was meeting with someone about his political campaign.

The fourth and fifth items are Bigley's use of an alias during a meeting with the agent and Bigley's isolated and innocuous statement while counting money in a bank vault that Columbia is "pot country." Bigley testified that he thought the agent was representing legal out of state gambling interests who were secretly buying up real estate in Georgia in anticipation of Dean's help in legalizing horse race betting in Georgia. During this entire conversation, no mention was made of any conspiracy with Dean.

The sixth, seventh and eighth items were statements by Dean on the tapes about a comment which Bigley allegedly made about suspecting the government agent of being a

government agent and about certain suspicious acts which Bigley allegedly committed. Bigley denied under oath that he had said any such thing and Bigley proved without contradiction at the trial that he never did the acts which Dean said he did and which the Fifth Circuit stated were proof of his guilt.

The ninth item is the true and admitted fact that Bigley did go to the Savannah Airport with Dean and that he was carrying a gun. Bigley again testified that he thought this was part of the real estate transaction with gambling interests. (Interestingly, the agent stated to Dean on the tape that Bigley should have "protection" if he came to Savannah because they would be carrying a large sum of money.)

The tenth item is Bigley's admitted statement to Dean at the Savannah Airport that he thought that Dean was being followed. Bigley admitted saying that and further testified that he was afraid at that time that the agent might be involved in some illegal activity.

Thus, in the record there is no direct statement by Bigley about any drug conspiracy and there was no statement made in Bigley's presence about illegal acts of drug importation by Dean.

In contrast to the weak and circumstantial evidence against Bigley, The Government's case against Dean was filed with explicit and inflammatory detail. Numerous profanity-ridden tapes of conversations between Dean and the undercover agent, Hirsch Friedman, dealt with huge sums of money, narcotics, and corruption in high places. The evidence concerning Dean was voluminous, not relevant to a conspiracy between Dean and Bigley, and revealed activities certain to arouse the ire of any jury.

Thus, the propensity for prejudice to Bigley because of the

nature of the evidence against Dean was overwhelming.

The undercover agent, Hirsch Friedman, surreptitiously made over thirty separate tape recordings of conversations with Dean. Of the ten separate pieces of evidence identified by the Fifth Circuit as indicating the guilt of Bigley, six of those consist of statements on the tape by Dean specifying comments or actions of Bigley. Bigley was not present when any of these statements on the tapes were made by Dean.

In considering questions concerning the tapes, it is important to note the following dates. The indictment was returned on February 21, 1980. The tapes were received by the defense on March 14. A hearing was held on the testing of the tapes on March 31, 1980. The Trial was scheduled to begin on April 25, 1980. As will be discussed, the Defense made a motion for a continuance so that the tapes could be tested by an expert. The Trial Court denied that motion for a continuance without specifying any reason not to grant one.

Without the tapes, it is clear that there would be no case against Dean or Bigley.

At the hearing on March 31, 1980, the defense submitted the testimony of Harry Hollien, Ph.D., a well-known and preeminent expert in tape technology.

Dr. Hollien described the complicated process of tape analysis involving computers, cathode ray oscilloscopes and other electronic equipment. He stated that it takes approximately nine hours to test each hour of tape. He testified that ninety days was "the least time" in which he could do a proper job of examining the tapes. He further identified at least thirty areas of concern on the single tape which he had examined before that hearing.

Dr. Hollien concluded that no expert could test the tapes in less than ninety days; this testimony was uncontroverted.

The Defendants requested a continuance so that Dr. Hollien could have ninety days to conduct the testing. The Trial Court denied that request, stating:

> [I]t appears that many of the tapes deal with fairly innocuous type comments, statements, that tie a later meeting, they are setting up various meetings, they are brief. And, the Court would think there would be very little reason to fabricate or in any way doctor these tapes. Now, there are a few of the tapes, or some of the tapes that are highly significant and very damaging to the defendants and it is the Court's belief that these tapes could be examined by the defendants in the time allowed. We will select a jury on this case on April 25th, which is a Friday. We will have opening statements probably on a Saturday. No testimony is to be received until April the 28th. I would certainly thing that would accommodate the needs of counsel.
>
> Well, I do not know of anything else I can do. You have until virtually a month. I have indicated that — I don't think all of the tapes are worthy of examination. I am not going to allow the length of time you are requesting, or the doctor indicated that he would need in the event he made the complete examination that he desired to make.

Dr. Hollien testified on April 29 that he had not completed his examination. He testified that defense counsel requested him to pay particular attention to tapes 7, 12, 17, 20, 24, 26, 27, 28, and 32. On tapes 7 and 12, Dr. Hollien stated that he had seventy questionable areas remaining for further analysis. He had had no opportunity to examine tapes 17 and 24. Regarding other tapes on which counsel requested special at-

tention, Dr. Hollien stated that he was 60% finished. He had not begun examination of tapes defense counsel had not identified for special attention. Dr. Hollien testified that he could not complete a proper examination of the tapes in less than six additional weeks.

REASONS FOR GRANTING THE WRIT

I. DOES OUTRAGEOUS GOVERNMENT CONDUCT PROVIDE A DEFENSE AGAINST PROSECUTION?

Bigley has adopted in this Petition the argument ("Reasons for granting the writ") in the separate Petition for writ of certiorari filed by codefendant Dean and incorporates that argument by reference herein. Included is the argument with respect to the Outrageous Government Conduct defense.

In addition, Bigley offers the following comments.

This case represents perhaps the extreme of outrageous Government conduct. In the so-called "Abscam" and "Brilab" cases, the Defendants either held high public office or had a past history of wrongdoing and corruption.

Although Dean had held public office and was still a candidate for public office, he did not hold one at the time and this makes this case all the more outrageous. Moreover, he had no past history of corruption.

Indeed, the only justification for this prosecution is the intense and bitter rivalry between Dean and the man who defeated him, the present Governor of Georgia. The Governor in fact organized and financed the whole effort to entice Dean into a non-existent drug conspiracy.

On three separate occasions during the course of this matter, Dean specifically declined and refused to become involved in State Government-sponsored criminal conspiracies. On each of those occasions when Dean refused to become involved, the state should have halted its efforts to get him. In such an investigation, once a criminal defendant has declined to become involved, the Government at that point should cease its efforts to get him involved.

The entire justification for prosecutions of this kind is the predisposition of the Defendants to criminal acts. Therefore, once a Defendant has refused to become involved, the conduct of Government agents becomes truly outrageous when they mount a continuing and persistent effort to lure a reluctant Defendant into acts of crime. This is exactly what happened in this case.

It is difficult to believe that any criminal prosecution could have less basis or justification than this one. Although this case was prosecuted in Federal Court and consumed three weeks of Federal Court Trial time, no federal agent became involved until the day the Defendants were arrested. All of the investigation was conducted by state agents motivated by state political concerns. No actual drug conspiracy existed.

Indeed, at a time in our history when Federal Judges are murdered in Texas and real drug conspirators kill each other on the streets of Miami, it is almost inconceivable that the Federal Court system is used as a dumping ground for state political cases such as this. This is the direct result of such outrageous Government conduct.

This is exactly why outrageous Government conduct must be a defense in such cases. Given the extreme set of facts presented here, if outrageous Government conduct is not a defense in this case, the it should not be a defense in any case.

II. WHAT PROCEDURES SHOULD BE USED TO EVALUATE A CLAIM OF OUTRAGEOUS GOVERNMENT CONDUCT?

Petitioner Bigley adopts and incorporates by reference the Brief and argument on this question in the Petition of codefendant Dean, No. 81-2017.

III. WHAT CONSTITUTES AGREEMENT AS TO THE ESSENTIAL ELEMENT OF A CONSPIRACY?

Petition Bigley adopts and incorporates by reference the Brief and argument on this question in the Petition of codefendant Dean, No. 81-2017.

IV. DOES THE INSTRUCTION THAT YOU CAN ONLY CONVICT ONE CONSPIRATOR BY ALSO CONVICTING THE OTHER CONSPIRATOR VIOLATE DUE PROCESS WHERE THE EVIDENCE AGAINST ONE IS OVERWHELMING AND INFLAMMATORY AND THE EVIDENCE AGAINST THE OTHER IS TENUOUS AND CIRCUMSTANTIAL?

Dean and Bigley were the only possible conspirators. Because there must be agreement between two persons to make a conspiracy, the Court attempted to instruct the jury that a conspiracy existed only if Dean and Bigley agreed to import drugs.

The trial court did not, however, merely tell the jury that they were required to find agreement between Dean and Bigley; rather, the trial court repeatedly instructed the jury that it could convict Dean only by convicting Bigley.

In other words, if you find that defendant Dean did what

> he is alleged to have done you can only find him guilty of conspiring if and only if he entered into an illegal enterprise with the defendant Bigley.

(Tr. XV-139)

> And, since it is a conspiracy limited to the two defendants, you cannot find one guilty of a conspiracy and the other one innocent.

(Tr. XV-145)

> [Y]ou recall that I reminded you that if you find that defendant did what he has been alleged to have done, you could only find him guilty of conspiring if and only if he entered into an illegal enterprise with the defendant Bigley.

(Tr. XV-156)

The Trail Court then instructed the jury properly that the case against each Defendant should be considered separately and individually. (T30:144) The Trial Court then said:

> The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict-that is inaccurate as pertains to this case. You should look at the defendants acts individually and separately. And, of course, you should look at Count Five individually as to Mr. Bigley. And, since it is a conspiracy limited to the two defendants, you cannot find one guilty of a conspiracy and the other one innocent.

After his charge, the judge expressed to counsel his concern about the correctness of this point. (T30:150) Nonetheless, the Trial Court recharged the jury as follows:

> [A] separate crime or offense is charged against one or more of defendants in each count of the indictment. Each offense and the evidence pertaining to it should be considered separately. Also, the case of each defendant should be considered separately and individually.
>
> Now, you recall that I reminded you that if you find that defendant Dean did what he has been alleged to have done, you could only find him guilty of conspiring if and only if he entered into an illegal enterprise with the defendant Bigley.

The question is whether the short phrase "the case of each Defendant should be considered separately and individually" is a sufficient qualification on the repeated and very distinct instruction of the Court that the jury could only find Dean guilty of conspiracy "if and only if" he entered into a conspiracy with Bigley.

In fact, this last reinstruction in which the Trial Court attempted to cure any possible mistake in the earlier charge actually compounded the error by repeating and reiterating the prior statements.

The obvious effect of the charge by the Trial Court was to instruct the jury that it could not acquit Bigley without also acquiting Dean. While this charge may be technically correct, it was not necessary to give the charge to the jury and in fact it should not have been given at all. Certainly the charge should not have been given without qualifying instructions.

The United States Supreme Court has recognized that certain instructions to the jury, although legally correct, are so likely to be misunderstood and misapplied by a jury that they may not be given. See *Bruton vs. United States*, 391 U.S. 123 (1968); *Jackson vs. Denno*, 378 U.S. 368 (1964).

The problem in this case is that the jury understood exactly what the charge meant. They understood that, in order to convict a man accused of agreeing to accept several million dollars in a corrupt exchange with a foreign drug ring, they had to convict Bigley, against whom the evidence was slight and circumstantial.

The classic rule to be applied in these joint conspiracy trials was stated by Mr. Justice Rutledge in *Blumenthal vs. United States*, 1947, 332 U.S. 539, 559-560, 68 S. Ct. 248, 92 L. Ed. 154 to the effect that each Defendant is to be protected and the obvious dangers to each minimized by "clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions," and, he added, "It is therefore extremely important that those safeguards be made as impregnable as possible."

The so-called "all or nothing" charge was condemned by the Second Circuit in *United States vs. Kelly*, 349 F. 2d 720 (2nd. Cir. 1965), a case similar in many key respects to this case. The Second Circuit noted in that case that the co-defendants of Shuck (whose conviction was reversed) were "unscrupulous swindlers of the first rank" who (the jury was "unquestionably entitled to find") were participants in a conspiracy. As to Shuck, however, the proof was "tenuous and unsubstantial." The Trial Court gave the so-called "all or nothing" charge. The Second Circuit reversed, stating in part:

> This was the equivalent of an instruction that the jury could not acquit Shuck on the conspiracy count without also acquitting Kelly and Hagen. Nothing could have been more helpful to Kelly and Hagen, who naturally do not raise the point here, and, by the same token, nothing could have been more prejudicial to Shuck. As noted in Borelli, 336 F. 2d at pages 382-383, as we interpret the

> holding, this error is of such grave consequence to Shuck as to fall into the category of "plain error" to be taken into consideration even if not noted by counsel at the trial. However, it is only fair to the trial judge to say that, had Judge Friendly's opinion in Borelli been filed and thus brought to the attention of the trial judge prior to the commencement of the trial of this case the "all-or-nothing" instruction would not have been given. Furthermore, lest the matter be left in any doubt, we hold that the "all-or-nothing" instruction in this case was "plain error" requiring reversal even in the absence of objection at the trial. Fed. Rules Crim. Pro., 52(b).

Noting the inflammatory nature of the evidence against the co-defendants, the Second Circuit noted that "no amount of cautionary instructions could have undone the harm to Shuck" and "the instructions as given were mild and ineffectual." The Court noted the prejudice to Shuck of the "inexorable accumulation of evidence" against the Co-defendants.

Exactly the same situation exists in this case with respect to Bigley. In this case as in that case, there is overwhelming and inflammatory evidence against one Defendant, tenuous and insubstantial evidence against the other Defendant, and the "all or nothing" charge that you cannot convict one without the other.

The Ninth Circuit has held that it would be error to give the "all or nothing" charge. *United States vs. Estrada*, 441 F. 2d 873 (9th. Cir. 1971). The Fifth Circuit specifically approved the charge in *United States vs. Crockett*, 514 F. 2d 64 (5th. Cir. 1975). Later Second Circuit decisions seem to approve the "all or nothing" charge if there are other charges which stress the need to consider each Defendant's guilt or innocence individually. *United States vs. Bynum*, 485 F. 2d 490 (2nd. Cir. 1973); *United States vs. Cohen*, 518 F. 2d 727 (2nd. Cir. 1975)

United States vs. Finkelstein, 526 F. 2d 517 (2nd. Cir. 1975). However, the later Second Circuit decisions do not involve situations where the evidence is overwhelming and inflammatory against one Defendant and "tenuous and insubstantial" against the other.

Thus, there is sufficient jurisdiction for a clarification of that issue by the United States Supreme Court.

V. DID THE TRIAL COURT DEPRIVE THE APPELLANTS OF THEIR CONSTITUTIONAL RIGHTS BY DENYING THEM THE RIGHT TO SUBMIT CERTAIN TAPE RECORDINGS TO EXPERT TESTING AND ANALYSIS?

"Fundamental fairness is violated when a criminal defendant.....is denied the opportunity to have an expert of his choosing.....examine a piece of critical evidence whose nature is subject to varying expert opinion." *Gray vs. Rowley*, 604 F. 2d 382, 383 (5th. Cir. 1979). See *United States vs. Gualtney*, 606 F. 2d 540, 545 (5th. Cir. 1978); *White vs. Maggio*, 556 F. 2d 1352 (5th. Cir. 1977); *United States vs. Herndon*, 536 F. 2d 1027, 1028 (5th. Cir. 1976); *Bernard vs. Henderson*, 514 F. 2d 744 (5th. Cir. 1975).

The effect of the decision of the Fifth Circuit in this case is to afford trial courts the discretion to restrict Defendants (1) to incomplete testing of "very damaging" tapes and (2) to no testing of tapes which are not "very damaging" in the trial court's view.

Justice Black stated in *Berger vs. New York*, 388 U.S. 41, 74, 87 S. Ct. 1873, 1980, 18 L. Ed. 2d 1040, 1061 (1967) (Black, J., dissenting) that an authentic and accurate recording of a Defendant's voice as he discusses or engages in illegal ac-

tivities will be "so unerringly accurate that it is practically bound to bring about a conviction."

It is well recognized that there is a constant danger of post-recording tampering and alteration. 17 Am. Jur. Proof of Facts 1, 12-21 (1966).

To be admissible, the authenticity of the tape recording must be established and it must be shown that changes, additions or deletions have not been made. *United States vs. McMillan*, 508 F. 2d 101, 104 (8th Cir. 1974), cert. den. 421 U.S. 916 (1975). The Government is required to "go forward" with such proof, the Court noting that "sound recordings are susceptible to alterations that may be impossible to detect." *United States vs. Biggins*, 551 F. 2d 64, 66 (5th. Cir. 1977).

Where the Defendant produces evidence of possible tampering, an independent evaluation should be ordered by the Court and paid for by the Government. *Alonzo vs. State ex rel. Booth*, 282 Ala. 607, 624, 219 So. 2d 858, 874 (1964) (Coleman, J. dissenting) cert. den. 396 U.S. 931 (1969). See Fed. R. Crim. P. 28(a).

Where tape recordings are to be introduced, it is absolutely imperative that the Defendant be afforded discovery rights in order to determine if the recordings are accurate or if they have been subject to tampering. Such discovery and the testing necessary for such discovery responds to "the articulated congressional skepticism about electronic monitoring, as an insidious invasion of privacy to be singled out for special scrutiny and safeguards." *In re Lochiatto*, 497 F. 2d 803, 807 (1st. Cir. 1974).

In this case, the Government offered no scientific evidence that the tapes had not been tampered with. Instead, it simply established the chain of custody and the undercover agent

testified as to his ability and experience in operating the machines. (It does not seem to have occurred to the Government that such "ability and experience" would also give him the expertise to tamper with the tapes.)

What was the reaction of the Trial Court to the initial testimony of the Defense expert at the preliminary hearing on March 31, 1980 that there were at least thirty areas of concern on the single tape which he had examined at that time? Despite the fact that such testimony presented "probable cause" to believe that the tapes had been tampered with, the Court made the following ruling:

(1) Many of the tapes contain "innocuous comments" that there would be "very little reason to fabricate."

(2) A few of the tapes are "highly significant" and "very damaging" to the Defendants.

(3) Not all of the tapes are worthy of examination.

(4) The Defense would have time prior to trial to examine the "highly significant" and "very damaging" tapes.

Two points should be noted. One, the Government had had many of these tapes for six or eight months. It had had ample opportunity to conduct scientific testing yet had failed to do so. Second, as the Government concedes, it had the burden of going forward with the evidence to show the absence of material deletions, additions or material alterations of the tapes.

Despite being confronted with evidence that the tapes had substantial areas of suspicion with respect to material alteration, the trial court in effect shifted the burden of proof on this question to the Defendants. In doing so, the Trial Court im-

posed upon the Defendants an impossible choice. The court told the Defendants that they had to choose which tapes they could test in the allotted period of time. The Court told them that they could test all of the tapes but, since they only had a short period of time, they would have to choose the most "highly significant" and "very damaging" tapes and test them.

This is a sort of shell game (which shell is the pea under) theory of justice. Pick the right one and you find the evidence. Pick the wrong one and you get five years in custody for conspiracy.

The Trial Court clearly erred in imposing that choice on the Defense.

The Government responds to this argument by stating that the Defense expert could not definitively state after examining some of the tapes that they had been tampered with. What the Defense expert said was that he could not render an opinion on the tapes without further testing and that he had identified seventy specific areas of concern which remained to be tested. What the Government chooses to ignore is that at that time most of the tapes had either not been tested or had been half tested.

Again, on April 29, 1980 when the expert again testified, the Trial Court in effect required the Defense to show that the tapes had been tampered with. But, in order to provide the necessary showing to require additional time for testing, the Defense need only show that a disagreement concerning a material fact could exist. *Barnard vs. Henderson*, 514 F. 2d 744 (5th. Cir. 1975); *White vs. Maggio*, 56 F. 2d 1352 (5th. Cir. 1977).

Thus, on two occasions, the Defense expert offered uncontradicted scientific (as opposed to lay) testimony that there

were substantial problems with the tapes that he had already examined (even though he could not definitely and conclusively state that the tapes had been tampered with).

Thus, on two separate occasions the Trial Court was confronted with scientific testimony concerning the suspicious nature of the tapes. The Defense only requested that it have additional time to test the tapes. The Trial Court on the second occasion when it was confronted with this question could have: (1) granted the request for additional time (2) ordered the government to test the tapes or produce scientific evidence of their accuracy (3) ordered an independent examination of the tapes (4) denied the request for additional time and proceeded to trial. The Trial Court did in fact do the last of these alternatives.

In doing so, it denied to the Defense its Due Process right to test the tapes for additional evidence.

Respectfully submitted,

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May 21, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 80-7466

D.C. Docket No. CR480-13

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ROSCOE EMORY DEAN, JR., and
JOHN THOMAS BIGLEY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

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Before RONEY, VANCE and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same

is hereby affirmed in part, and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

January 22, 1982

A True Copy
Attested
Clerk,
U.S. Court of Appeals
Fifth Circuit

By /s/ Linda G. Pritt
Deputy Clerk
Atlanta, Ga.

Issued as Mandate: Apr. 2, 1982

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7466

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

JOHN THOMAS BIGLEY,
Defendant-Appellant.

Filed Mar. 23, 1982

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 22, 1982, 5 Cir., 198–, —— F.2d ——)
(March 23, 1982)

Before RONEY, VANCE and RANDALL, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CR480-13

UNITED STATES OF AMERICA,
Plaintiff

vs.

ROSCOE EMORY DEAN and
JOHN THOMAS BIGLEY,
a/k/a MOORE,
Defendants

ORDER ON THE MOTION TO SUPPRESS THE SEIZURE OF ITEMS FROM DEFENDANT DEAN'S AUTOMOBILE AND THE MOTION TO DISMISS INDICTMENT ON THE BASIS OF OUTRAGEOUS AND UNLAWFUL INVESTIGATIVE GOVERNMENT CONDUCT

Defendants Dean and Bigley were arrested on January 28, 1980 in the parking lot of the Savannah Civic Center. Defendants were arrested by Atlanta Attorney Hirsch Friedman who is a consultant to the Georgia Bureau of Investigation (GBI) on organized crime. Defendants claim Friedman's conduct violated defendants' due process rights and that evidence seized from defendant Dean's automobile pursuant to the arrest should be suppressed. The facts concerning the investigation and arrest of these defendants are as follows:

Hirsch Friedman, an Atlanta lawyer who occupies the position as a consultant to the Georgia Bureau of Investigation, began a relationship with defendant Roscoe Dean on or about August 22, 1979. This relationship began via a telephone call from Friedman's law offices in Atlanta, Georgia to Roscoe Dean in the Southern District

of Georgia. This telephone conversation was recorded by Friedman on an office tape recorder. Over the next six months Friedman had approximately thirty-five conversations with defendant Dean, all of which were recorded. Approximately twenty conversations were over the telephone, the remaining conversations were person to person conversations between Friedman and Dean.

Friedman held himself out to be the representative or spokesman for a group of persons who were involved in marihuana and cocaine traffic. Friedman represented that these people were interested in bringing in controlled substances through the coastal Georgia area. Dean, in exchange for monies to help finance a gubernatorial bid, promised or agreed to help Friedman or Friedman's so-called clients in bringing drugs into the Georgia coastal area.

In January of 1980 a dry run was made in which Dean was led to believe that marihuana was brought into the State. At all times Friedman was acting in his role as a GBI consultant.

On January 28, 1980, Friedman flew to Savannah from Atlanta in a Georgia Department of Transportation airplane. Friedman was picked up in front of the Savannah Airport by defendant Dean who was driving his own car. Friedman was carrying an athletic bag. Inside the athletic bag was a small vinyl bag which contained $63,000 in cash. This $63,000 was to be used to pay Dean for his assistance in the dry run which had occurred a few days previously.

Friedman entered Dean's car and took the small vinyl bag out of the athletic bag and placed it on the transmission hump in front of the front seat. Friedman was wearing a body recorder on his leg as well as a device known as a T-2 transmitter. Dean began driving toward Savannah. Friedman testified they were supposed to go to the C & S Bank located on Bull Street in downtown

Savannah. Supposedly, $10,000,000 in cash was to be picked up at the C & S Bank.

Before arriving in Savannah, Dean pulled over to the side of the road and got out of the car. Another car stopped in front of Dean and Friedman recognized the driver of that car as defendant Bigley. Dean went to Bigley's car where the two spoke briefly. Dean came back to the car and told Friedman that Bigley thought they were being followed. Bigley then approached the car and Friedman could see that Bigley was carrying a pistol in a shoulder holster. Bigley reported that he had observed a person talking into a walkie-talkie and he thought the police were following them. Friedman labeled Bigley as Dean's counter-surveillance man.

The men got back into their cars and continued the drive to Savannah. Along the drive back to Savannah, Dean told Friedman that Bigley thought Friedman to be an undercover agent.

Approximately twenty to thirty minutes later the two cars arrived in the parking lot of the Savannah Civic Center. The two cars stopped. Defendant Dean got out of his car, leaving the car door open, walked over to Bigley's car and entered into a conversation with Bigley. Bigley's car was parked approximately fifty feet to the left of Dean's vehicle. During the conversation between Dean and Bigley, both men's backs were turned to Friedman who was still sitting in the car.

Approximately two minutes after Dean exited the car, Friedman got out of Dean's car, pulled out a Colt 357 Magnum which he was carrying and approached the two defendants. Bigley turned toward Friedman at which point Friedman took out his credentials and stated, "Gentlemen, kindly raise your hands over your head. You're under arrest." Bigley asked, "What for," to which Friedman responded, "You're under arrest for violation of federal drug laws."

Friedman contends and also the Government that the arrest was made under Ga. Code § 27-211 which is the statutory provision for a citizen's arrest. Friedman testified he had no authority under his consultant relationship with the GBI to make an arrest.

The cars were parked approximately six hundred to seven hundred feet from the entrance to the Civic Center. Friedman marched the two defendants across the Civic Center parking lot to the Civic Center building. Friedman had the two place their hands on the outer wall of the Civic Center where he conducted a pat-down search and seized Bigley's gun. Friedman then marched the two inside the building. Once inside Friedman asked some Civic Center employees to call both the GBI and FBI and instructed the employees to tell them that the man from Atlanta had arrested the two suspects. Friedman and the two defendants then proceeded to the cloak room where Friedman remained with the two defendants.

Five to ten minutes later a Savannah police officer arrived. Friedman showed his credentials to the police officer. The policeman handcuffed the two defendants. Friedman then turned Bigley's pistol over to the policeman. At this point Friedman remembered that he had left the $63,000 in Dean's vehicle and that no one was standing guard over the vehicle. Friedman told the policeman he had money in the car and asked him if he would watch the two defendants while he went to the parking lot.

Friedman returned to Dean's car where he reached through the driver's door which was open and retrieved the vinyl folder containing the money from atop the transmission hump. The car was running so Friedman turned off the ignition. After retrieving the money, Friedman returned to the Civic Center. At this point, no FBI or GBI agents were present. Officer Christy, a Savannah police officer, had the two defendants in custody. A second Savannah police officer arrived approxi-

mately the same time that Friedman returned from the car.

Five to ten minutes after Friedman retrieved the money from the car the first FBI agent arrived. Shortly thereafter, GBI Agents Peters and Thorpe arrived at the Civic Center scene along with FBI Agents Henshaw and Snead. GBI Agent Peters informed the two defendants of their rights.

The entourage of GBI and FBI agents went out to the parking lot to the two cars. Friedman give the vinyl folder with the money to Agent Peters. Peters returned the folder to Friedman and asked him to place it back in the car in the same position as it was before Friedman removed it. Friedman reached in the car, placed the folder back on the transmission hump. Agent Thorpe then took photos of the vehicle. No one else entered Dean's car. The trunk was never open nor any other part of the car inspected. From this point on security was maintained around the vehicle. After the photographs, the vinyl folder containing the money was once again retrieved from the car by Friedman who gave it to GBI Agent Thorpe who brought it back to the GBI evidence vault.

Friedman testified that he was given back his athletic bag which contained just toilet articles, a t-shirt, and underwear when he arrived at the GBI Headquarters. However, Agent Thorpe testified he thought that the tennis bag was removed by Friedman after the photographic session in the parking lot.

After defendants were arrested, they were brought before this Court for a preliminary hearing. The bond was set on each defendant at $25,000. An affidavit for a search warrant to search Dean's vehicle was also presented to the Court by FBI Special Agent Maurice Snead. A search warrant was issued. However, both Dean and Bigley gave their full, willing and knowing consent to have their vehicles searched in Court. The Court gave both defendants an ample opportunity to speak with their

attorneys before allowing the two to consent to this search.

An inventory search was conducted of Dean's vehicle in his presence and in the presence of his counsel. That search ended at 8:25 p.m. on January 28, 1980. Polygraph papers, electronic bugging equipment, a pistol, lie detector, passports, and other items were seized from Dean's vehicle. Defendants now contend (1) that defendant Dean's vehicle was illegally seized by Friedman; (2) that the vehicle was improperly entered and searched prior to the issuance of a search warrant; and (3) the search warrant was invalid. The defendants further contend that Hirsch Friedman's conduct in representing himself to be an attorney for a group of Atlanta investors or businessmen and was such egregious conduct constituting a violation of defendant Dean's constitutional right to fundamental fairness.

CONCLUSIONS

A. Seizure of Evidence From Dean's Vehicle

The Court finds it need not address the issue of whether the search warrant issued for the search of Dean's vehicle was valid since defendant Dean gave his free and voluntary consent to the search. Defendant Dean contends that the arrest of defendants Dean and Bigley was an illegal arrest and the seizure of the automobile and its contents incident to the arrest was illegal.

Friedman attempted to arrest defendants under the authority of Georgia Code Annotated § 27-211 which provides in part: "A private person may arrest an offender, if the offense is committed in his presence or within his immediate knowledge . . . ." The arrest of Dean and Bigley by Friedman clearly falls under this code section. Friedman is a private person, and it was within his immediate knowledge that defendants were conspiring to violate the Federal Controlled Substances Act.

The Court finds no merit in defendant's argument that Friedman's seizure of the money from Dean's vehicle was an unlawful search of the car and thus invalidates Dean's consent. Friedman's intrusion into the car was for the sole purpose of preventing the loss of evidence, i.e., a precautionary measure to secure the $63,000 cash which was in open view to any passerby. The evidence which Dean seeks to suppress was seized from the trunk of the vehicle. The only part of the car entered by Friedman was the passenger compartment; he never entered the trunk. During the preliminary hearing, it was defendant's counsel who first suggested and volunteered that defendants consent to the search of their vehicle. The Court would not accept defendants' consent until defendants were given an opportunity to freely discuss the ramifications of such consent with their attorney. The Court allowed a ten minute recess for this purpose and upon reconvening, the defendants, through their attorney, stated they had no objection to having either defendant Bigley's car or defendant Dean's vehicle searched. The Court finds defendants' consent was free from any duress or coercion and was voluntarily given. The Court further finds the search of the trunk of defendant Dean's vehicle was valid and the evidence seized therefrom shall not be suppressed.

B. Government's Egregious Conduct

Defendants contend that the Government's use of an attorney as an undercover agent is such outrageous and unlawful investigative conduct that the indictment should be dismissed. The Court does not agree the alleged conduct of the Government approaches this "outrageous" level.

In *Hampton v. United States*, 425 U.S. 484 (1976), the Supreme Court considered this fundamental fairness defense in a situation involving the conviction of a defendant for selling heroin to a Government agent when

the heroin was supplied to the defendant by another Government agent. The Court in holding this conduct not to amount to a deprivation of defendants' due process rights, stated:

> "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Hampton*, 425 U.S. at 483.

The Court finds no constitutional violations in Friedman's use of his position as an attorney to gain evidence against defendants Dean and Bigley. Although the Court expresses no opinion regarding an attorney acting as an undercover agent, if defendants feel Friedman has improperly or unethically used his professional position in this light, then the State Bar is the proper place to voice their grievances.

Defendants' motion to dismiss the indictment is hereby denied. Defendants' motion to suppress evidence seized from defendant Dean's vehicle is also denied.

This April 24, 1980.

/s/ B. Avant Edenfield
Judge
United States District Court
Southern District of Georgia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CR480-13

UNITED STATES OF AMERICA,
Plaintiff

vs.

ROSCOE EMORY DEAN, JR.
JOHN THOMAS BIGLEY,
Defendants

ORDER

On May 14, 1980, after seventeen (17) days of trial, a jury found defendants Dean and Bigley guilty on three counts of conspiracy to import drugs (marihuana, cocaine, and methaqualone) in violation of 21 U.S.C. § 963. In addition, defendant Bigley was found guilty of possessing a firearm during the commission of a felony in violation of 18 U.S.C. § 3924(c)(2). Currently before the Court is defendants' Rule 33 motion for a new trial and motion for an evidentiary hearing. This Order constitutes the Court's ruling on these motions.

Defendants base their motion for a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence is:

1) The involvement of Governor Busbee's office in aiding the Government's chief witness, Attorney Hirsch Friedman, in obtaining a delay in the appeal of criminal convictions of two of Friedman's clients, also witnesses in the case against Dean;

2) An offer by Governor Busbee of $50,000 to Georgia Attorney General Arthur Bolton for use in the prosecution of defendant Dean;

3) That Governor Busbee requested Bolton to prosecute Dean even though Bolton advised the Governor otherwise;

4) That in December, 1979, the United States Attorney for the Southern District of Georgia, the United States Attorney for the Northern District of Georgia, and certain state prosecutors had reached the conclusion that no conspiracy existed involving defendant Dean; and

5) The date Hirsch Friedman was appointed as consultant/investigator for the Georgia Bureau of Investigation.

To prevail on a motion for new trial based on newly discovered evidence, a defendant must establish four prerequisites:

1) The evidence is newly discovered and was unknown to the defendant at the time of trial;

2) The evidence is material and not merely cumulative or impeaching;

3) The evidence would probably produce an acquittal; and

4) The failure to learn of the evidence was due to no lack of diligence on the part of the defendant.

United States v. Johnson, 596 F.2d 147, 148 (5th Cir. 1979).

Assuming arguendo that the five allegations of newly discovered evidence are true or could be proven during trial, the Court finds the four prerequisites for the granting of a new trial have not been met, nor through an evidentiary hearing could that hurdle be cleared.

Assuming this evidence to be newly discovered and that there was no lack of diligence on defendants' part (the first and fourth prerequisites) the Court finds that the evidence is not material and that it probably would

not produce an acquittal. The involvement of the Governor's office with the two criminal appeals of Friedman's clients would be useful merely for the purpose of impeaching the testimony of Friedman, his clients and possibly other Government witnesses.

Any offer by Governor Busbee to assist in financing a prosecution of Dean by the State of Georgia is immaterial to the issues tried before this Court. The Court does not feel this matter would be relevant to the entrapment defense with which the Court allowed the defendants to proceed. Further, this evidence would not produce an acquittal, inasmuch as this alleged action by Busbee was a response to his learning of an assassination threat by Dean against Busbee. Evidence of this threat was withheld from the jury; however, were a new trial to be granted on a newly discovered evidence basis, this highly prejudicial evidence would be admitted, thus lessening defendant Dean's chance of acquittal.

Likewise, the Court can find nothing material to the issues in this case in Governor Busbee's alleged request of Attorney General Bolton to prosecute Dean.

The Court finds that any pre-arrest meetings between prosecutors and law enforcement officials regarding an ongoing investigation of Dean and their opinions regarding the sufficiency of the evidence at that stage of the indictment is not *Brady* material required to be disclosed. Even if these opinions are viewed as *Brady* material, the *Brady* rule requires retrial only if the unproduced evidence creates reasonable doubt that did not otherwise exist concerning guilt of accused. *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978). This evidence does not create a reasonable doubt that did not otherwise exist.

The date of the appointment of Hirsch Friedman as a consultant/investigator for the Georgia Bureau of In-

vestigation is immaterial and probably would not produce an acquittal.

Defendants' motions for a new trial and for an evidentiary hearing are hereby denied.

This 18th day of June, 1980.

/s/ B. Avant Edenfield
Judge
United States District Court
Southern District of Georgia

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT*
UNIT B

No. 80-7466

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROSCOE EMORY DEAN, JR., and JOHN THOMAS BIGLEY,
Defendants-Appellants.

Jan. 22, 1982

Appeal from the United States District Court
for the Southern District of Georgia

Before RONEY, VANCE and RANDALL, Circuit Judges.

VANCE, Circuit Judge:

Appellants Roscoe Emory Dean, Jr. and John Thomas Bigley were convicted after trial by jury on three counts of conspiracy to import cocaine, marijuana, and methaqualone in violation of 21 U.S.C. §§ 956, 963. Bigley alone was convicted on one additional count of using a firearm in the commission of a federal felony in viola-

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

tion of 18 U.S.C. § 924(c)(2).[1] These crimes were committed as episodes in a tragicomic effort to enlist narcotics interests in Dean's campaign to become governor of the State of Georgia. Dean and Bigley allege numerous errors at trial.

In the summer of 1979 Dean, then a state senator in the Georgia legislature, asked James Chaffin to introduce him to someone with connections in the South American drug importation trade. Dean explained to Chaffin that he intended to solicit $10,000,000 from such a person for his 1982 gubernatorial campaign in exchange for his promise to facilitate the importation of drugs into Georgia if he were elected governor. Chaffin consulted with his attorney, Hirsch Friedman, and decided to act as a government informant in exchange for leniency in an unrelated state criminal prosecution against him. Friedman contacted the Georgia Bureau of Investigation which thereafter coordinated the probe.

Chaffin arranged for Dean and Friedman to meet August 24, 1979 on Jeckyll Island, Georgia. At that meeting, Dean explained his plan to assist the drug smugglers in exchange for campaign contributions. He also expressed his concern about surveillance devices and suggested that they speak in riddles. Dean's concern was well founded because this conversation was being recorded surreptitiously by Friedman, as were most of the later conversations between the two.

Dean and Friedman next met September 6, 1979 on Jeckyll Island. Dean added a number of details to his plan to facilitate importation as governor, including the appointment of narcotics interests to law enforcement

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[1] Dean was sentenced to concurrent five year prison sentences and fined $10,000 for each offense. Bigley was sentenced to three concurrent one year prison terms for the conspiracy convictions and placed on three years probation for the firearms violation.

positions and the selective prosecution of rival drug importers. On October 12, 1979 Friedman brought Sergio Abreu to a meeting with Dean on Jeckyll Island. Abreu, a Florida law enforcement agent, posed as a Colombian involved in Friedman's drug organization. Dean informed Abreu that an associate of his, Richard Daily, was negotiating with narcotics interests in Tampa, Florida for additional campaign contributions. Dean stated that Daily was at a friend's house four or five minutes away from the hotel on Jeckyll Island at which they were meeting. That placed Daily in the proximity of the home of Dean's coappellant, Bigley.[2]

On November 5, 1979, Friedman informed Dean that Abreu had agreed to Dean's scheme. On January 9, 1980, however, Friedman told Dean that Abreu had died in an earthquake in Colombia, and that different arrangements would have to be made. Dean proposed that they meet on January 11, 1980 at Bigley's home on Jeckyll Island. At this meeting, which Bigley did not attend, Friedman told Dean that the narcotics organization wanted to test his trustworthiness by undertaking an importation at a site suggested by Dean. Although Dean expressed reservations about safety, he agreed to the test. He also expanded upon his plans to launder the $10,000,000 campaign contribution. The meeting was interrupted when a neighbor of Bigley appeared at the front door. Dean telephoned Bigley at his fiancee's house and directed him to tell anyone who inquired that Dean was meeting with his lawyer about the campaign.

Dean and Friedman agreed that Bigley, using the alias of "Moore," would meet Friedman at a bank in Savannah to count $10,000,000. Dean informed Friedman that Bigley was "in the thing with us" but did not know

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[2] Bigley was employed at the time at a waste-water sewage treatment plant on Jeckyll Island. Evidence showed that he had been a political confederate of both Daily and Dean for a number of years.

Friedman's identity.[3] On January 18, 1980 Dean drove Bigley to a point several blocks from the bank. Bigley identified himself to Friedman as "Mr. Moore" and proceeded to count $7,500,000 contained in several safety deposit boxes in a bank vault. While counting, Bigley checked for counterfeits and carried on a general conversation with Friedman about marijuana from Colombia and gambling. Dean subsequently stated that Bigley expressed his suspicion that Friedman was a government agent.

During the next week, Dean and Friedman undertook a "dry run" of the trial drug importation.[4] Dean reported to Friedman that Bigley had observed the local police station during the exercise and that Bigley had later gone to Miami to meet with a Haitian about laundering the money.

On January 28, 1980 Dean and Friedman drove to the Savannah airport accompanied by Bigley in a separate car. Dean's purpose was to receive custody of the $10,000,000. When Bigley arrived at the airport, he noticed frantic activity by law enforcement personnel. He waved down Dean and Friedman and informed them of what he had seen. Soon thereafter, Friedman effectuated a citizen's arrest and confiscated a Smith and Wesson .38-caliber revolver that Bigley carried in a shoulder holster.

At trial, Dean declined to testify on his own behalf. Bigley testified that he had no knowledge of the narcotics-related purpose of the dealings between Dean and Friedman, but had been told by Dean that the $10,000,000 was part of a legitimate real estate transaction. He also

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[3] Dean also stated that Bigley did not know about the narcotics-related purpose of the meetings between Dean and Friedman. The jury was of course free to believe or disbelieve this statement.

[4] Dean played a major role in the planning of this dry run.

denied that he had observed the local police station for Dean or had made any arrangements to launder money.[5]

I.

Both appellants challenge the sufficiency of the evidence against them on the conspiracy counts. The bases for these challenges differ. Bigley claims that the government failed to prove beyond a reasonable doubt that he conspired with Dean to violate the narcotics laws. Dean claims that his conviction cannot stand if Bigley is acquitted because Bigley is the only person with whom Dean is accused of conspiring. *See, e.g., United States v. Sheikh*, 654 F.2d 1057, 1062 (5th Cir. 1981); *United States v. Espinosa-Cerpa*, 630 F.2d 328, 331 (5th Cir. 1980). We find that the evidence was sufficient to convict both Dean and Bigley of conspiracy to import narcotics.

The standard of review as to sufficiency of the evidence is whether a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt. *United States v. Rodriguez*, 654 F.2d 315, 317 (5th Cir. 1981); *United States v. Kelley*, 630 F.2d 302, 303 (5th Cir. 1980). In conducting that review, we view the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and we accept all credibility choices and draw all reasonable inferences that support the jury's verdict. *United States v. Staller*, 616 F.2d 1284, 1292 (5th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980); *United States v. Barrentine*, 591 F.8d 1069, 1083 (5th Cir.), *cert. denied*, 444 U.S. 990, 100 S.Ct. 521, 62 L.Ed.2d 419 (1979).

In order to sustain the convictions of Dean and Bigley, it must appear that both men agreed to violate the nar-

[5] Bigley admitted traveling to Miami on the date in question, but claimed that the purpose of his visit was to meet his fiancee's parents.

cotics laws. *United States v. Diaz*, 655 F.2d 580, 584 (5th Cir. 1981) *cert. denied*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 50 U.S.L.W. 3567 (1982). *See also United States v. Spradlen*, 662 F.2d 724, 727 (11th Cir. 1981). The government need not show that either man committed an overt act in furtherance of the conspiracy. *United States v. Rodriguez*, 612 F.2d 906, 919-20 n.37 (5th Cir. 1980) (en banc), *aff'd sub nom. Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *United States v. Michel*, 588 F.2d 986, 994 (5th Cir.), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979). The existence of an agreement may be inferred, however, from the concert of action between the two men. *United States v. Wilson*, 657 F.2d 755, 759 (5th Cir. 1981); *United States v. Arredondo-Morales*, 624 F.2d 681, 684 (5th Cir. 1980).

In this case, the only serious question of appellants' guilt is whether Bigley knew of the narcotics-related objective of the dealings between Dean and Friedman. Taken in the light most favorable to the government, the evidence shows:

(1) Dean's statement to Friedman that Bigley was "in the thing with us."

(2) The meeting between Dean and Friedman at Bigley's house.

(3) Dean's instructions to Bigley to offer an explanation to Bigley's neighbors of Dean's presence.

(4) Bigley's use of the alias agreed upon by Dean and Friedman.

(5) The meeting between Bigley and Friedman at the bank to count millions of dollars and their discussion of marijuana from Colombia.

(6) Dean's statement that Bigley suspected Friedman of being a government agent.

(7) Bigley's meeting with a Haitian in Miami to arrange for the laundering of the $10,000,000.

(8) Bigley's activities around a police station during a "dry run" of narcotics importation.

(9) Bigley's travel to the Savannah airport with Dean and Friedman while carrying a firearm.

(10) Bigley's departure from the Savannah airport to warn Dean and Friedman of the activity of law enforcement personnel.

This evidence certainly suffices to allow a reasonable jury to discredit Bigley's statement that he believed he was assisting a real estate transaction. *Cf. United States v. Hinds*, 662 F.2d 362, 366 (5th Cir. 1981); *United States v. Spradlen*, 662 F.2d at 727 (jury could reasonably disbelieve defendant's innocent explanation of events). It also suffices to establish beyond a reasonable doubt that Bigley knew of the narcotics-related purpose of the activities involving himself, Dean, and Friedman. This is not a case in which the only evidence of Bigley's guilt is association with other conspirators, *see, e.g., United States v. DeSimone*, 660 F.2d 532, 537-38 (5th Cir. 1981); *United States v. Reyes*, 595 F.2d 275, 280-81 (5th Cir. 1979), or activity that is suspicious though reasonably susceptible of an innocent interpretation. *See, e.g., United States v. Glasgow*, 658 F.2d 1036, 1040-42 (5th Cir. 1981); *United States v. Littrell*, 574 F.2d 828, 832-33 (5th Cir. 1978). Here, actions such as preparing for the laundering of money, observing a police station during a dry run of a narcotics importation, and warning Dean and Friedman of police activity at the airport leave no reasonable doubt that Bigley knew that the purpose of the activities in which he and Dean were engaging was criminal. *See United States v. Robertson*, 659 F.2d 652, 656-57 (5th Cir. 1981); *United States v. Alvarez*, 625 F.2d 1196, 1198-99 (5th Cir. 1980) (en banc), *cert. denied*, —— U.S. ——, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981). These actions, taken together with the state-

ment by Dean that Bigley was in the organization, Bigley's reported statement that Friedman was a government agent, and comments by Bigley regarding narcotics while he was counting out the millions of dollars to be used in the drug deal, leave no reasonable doubt that Bigley knew that the criminal activity in which he was involved was related to narcotics. *See, e.g., United States v. Mesa*, 660 F.2d 1070, 1074-75 (5th Cir. 1981); *United States v. Hernandez*, 646 F.2d 970, 979 (5th Cir. 1981).[6]

Although we find that there was sufficient evidence of a conspiracy to violate the narcotics laws, there is insufficient evidence to prove the existence of three separate agreements as alleged in the indictment. The government concedes as much in its brief. Since Dean was assessed a $10,000 fine for each count, this error was not harmless under the concurrent sentence doctrine. We therefore vacate Dean's sentence and remand this case to the trial court with instructions that the convictions of Dean on two conspiracy counts, at the election of the government, be reversed and dismissed. The conviction on the remaining conspiracy count shall be deemed affirmed and the trial court shall resentence Dean on that one count. *See United States v. Bradsby*, 628 F.2d 901, 906 (5th Cir. 1980). Although the error may be harmless with respect to Bigley, we conclude that the same disposition should be made in his appeal from the conspiracy convictions. *Id.* His conviction on the firearms count, however, is affirmed and the sentence that has been imposed by the trial court on that count shall remain in force.

II.

Bigley asserts that the trial court erred in admitting Dean's hearsay statements against Bigley under the co-conspirator exception of rule 801(d)(2)(E) of the Fed-

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[6] Because we find that the evidence was sufficient to convict Bigley, we necessarily find that Dean's sufficiency argument which was premised upon the proposition of Bigley's innocence must fail.

eral Rules of Evidence. We conclude that the trial court committed no error in this regard.

Our decision in *United States v. James*, 590 F.2d 575, 582-83 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), holds that evidence is admissible under the coconspirator exception only if it appears by the close of all the evidence that the government has shown by a preponderance, independent of the declarant's statements, that a conspiracy existed, that the defendant and the declarant were members of that conspiracy, and that the statements were made in furtherance of the conspiracy. *See also United States v. Chaney*, 662 F.2d 1148, 1153 & n.6 (5th Cir. 1981); *United States v. Horton*, 646 F.2d 181, 185 (5th Cir. 1981). Within our scheme in *James*, the primary responsibility for determining the admissibility of the challenged statements belongs to the trial judge. *United States v. Perry*, 624 F.2d 29, 31 (5th Cir. 1980); *United States v. Grassi*, 616 F.2d 1295, 1300 (5th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 220 (1980). The trial judge is obliged to consider the evidence of both the defendant and the government. *United States v. Ricks*, 639 F.2d 1305, 1309 (5th Cir. 1981). We will not overturn the judge's finding based upon his consideration of the merits of each side unless it is clearly erroneous. *United States v. Perry*, 624 F.2d at 30-31.

In this case, the independent evidence included, *inter alia*, Bigley's use of the alias agreed upon by Dean and Friedman, Bigley's discussion of narcotics while counting money in the bank vault, Bigley's departure from the airport when he observed police, and his efforts to warn Dean and Friedman not to go to the airport. Evidence on Bigley's behalf included statements by Dean that Bigley did not know about narcotics and Bigley's own testimony that he believed he was involved in a real estate transaction.

We cannot say, based upon this evidence before the trial judge, that he committed clear error in finding that the government has proved the existence of a conspiracy between Dean and Bigley by a preponderance. Evidence similar to that which the government presented has been found by courts to be probative of the existence of a conspiracy between a declarant and a defendant. *See, e.g., United States v. Chaney*, 662 F.2d at 1153 (use of alias agreed upon by defendant and declarant); *United States v. Mesa*, 660 F.2d at 1074-75 (conversations at prearranged sites with others in conspiratorial group); *United States v. D'Amato*, 493 F.2d 359, 365 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 50 (1974) (evasive action to avoid police surveillance); *United States v. Bickford*, 445 F.2d 829, 830 (1st Cir.), *cert. denied*, 404 U.S. 946, 92 S.Ct. 302, 30 L.Ed.2d 262 (1971) (alerting coconspirator and informant that someone was approaching). Also, we cannot on this record fault the trial judge for making credibility choices unfavorable to the defense. *Cf. United States v. Hernandez*, 646 F.2d at 973 (trial judge does not credit defendant's story that he did not know that the boxes he loaded into agent's car contained narcotics); *United States v. LaFerriere*, 546 F.2d 182, 184 (5th Cir. 1977) (trial judge does not credit defendant's story that he did not know that certain payments were unauthorized).

III.

Dean asserts that the government entrapped him into committing the offenses of which he has been convicted. This court has held that "when entrapment is at issue, the focal point of the inquiry is on the predisposition of the defendant." *United States v. Webster*, 649 F.2d 346, 348 (5th Cir. 1981) (en banc). The defendant must initially produce evidence that the government's conduct "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *United States v. Tobias*, 662 F.2d 381, 384 (5th Cir.

1981) (quoting *United States v. Mosley*, 496 F.2d 1012, 1014 (5th Cir. 1974)). If the defendant carries that burden, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime charged. *United States v. Tobias*, 662 F.2d at 384; *United States v. Dickens*, 524 F.2d 441, 444 (5th Cir. 1975), *cert. denied*, 425 U.S. 994, 96 S.Ct. 2208, 48 L.Ed. 2d 819 (1976).

We conclude that Dean's argument is totally devoid of merit. It would be ludicrous to believe that one who solicits millions of dollars in exchange for promises to appoint narcotics figures to government office and to prosecute selectively competing drug smugglers is predisposed to do anything but deal in drugs. If Dean was entrapped, it was in the web of his own ambition.[7]

IV.

Appellants raise a number of other arguments, none of which have merit. We conclude, therefore, that this case should be remanded with instructions as set forth in Part I of this opinion.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

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[7] Dean argues that even if the government's conduct in this case does not constitute entrapment, it was sufficiently outrageous to violate due process principles and to invoke the exercise of this court's supervisory powers to overturn the convictions. *See Hampton v. United States*, 425 U.S. 484, 495 n.7, 96 S.Ct. 1646, 1653 n.7, 48 L.Ed.2d 113 (1976) (Powell, J., concurring); *United States v. Twigg*, 588 F.2d 373, 377-81 (3d Cir. 1978). This court has recently considered the "outer limits" of permissible conduct by the government in pursuing the end of ferreting out crime. *United States v. Tobias*, 662 F.2d 381, 385-387 (5th Cir. 1981). The conduct by the government in this case falls well within those limits. Dean's argument for reversal is therefore totally devoid of merit.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CR 480-13

UNITED STATES OF AMERICA,

v.

ROSCOE EMORY DEAN, JR., and
JOHN THOMAS BIGLEY, a/k/a MOORE

ORDER

The matters in the foregoing memorandum having been considered by the Court, the motion for the government is hereby granted, this 1st day of April, 1980.

It is ordered that all original tapes in the above-captioned case be turned over to the Clerk's office of the Southern District of Georgia, where they will be maintained and made available to defense counsel for inspection and evaluation at the Georgia Bureau of Investigation crime lab located in Savannah, Georgia, in accordance with directives of the Court as ordered during the motion for inspection on March 31, 1980.

It is further ordered that said examination by defense experts may be conducted outside the regular business hours of the lab. The government is directed to make a good faith effort to facilitate the examinations.

It is further ordered that the defense analyst is to be allowed to bring equipment into the lab to facilitate the examination. It is further ordered that the examination take place in the presence of a representative of the government.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA